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No. 80-6045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

RUBIN KREMER,
Petitioner,
v.
CHEMICAL CONSTRUCTION CORPORATION,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC), with the written consent of the parties,[1] respectfully submits this brief as Amicus Curiae in support of the Respondent, Chemical Construction Corporation.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to a variety of federal statutes that prohibit discrimination in employment, including Title VII of the Civil Rights Act of 1964, *as amended* (42 U.S.C. §§ 2000e *et seq.*) (1976), the Equal Pay Provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1) (1976), the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 623 (1976), and the Reconstruction Era Civil Rights Act, 42 U.S.C. § 1981 (1976). Still further, EEAC's members are typically subject to comprehensive fair employment laws enacted by the vast majority of states of the Union. *See generally* J. Champagne & J. Lerner, Equal Employment Opportunities Under Federal and State Laws: A Guide to Laws and Orders Prohibiting Discrimination in Employment (1973). As such, EEAC's members have a direct interest in the issue presented for the

Court's consideration: that is, whether a state court judgment adverse to plaintiff's state employment discrimination claim bars his subsequent Title VII action on the same claim in federal court.[2]

At issue in this case is the extent to which doctrines of prior adjudication and 28 U.S.C. § 1738 limit the duplication of successive court actions alleging employment discrimination brought on behalf of the same plaintiff. The Second Circuit has indicated in the circumstances of this case that state judicial proceedings initiated by the plaintiff and brought to final resolution in state court are sufficient to foreclose later federal Title VII suit on the same claim. Because of the impact in cost upon employers and the effects upon the use of scarce judicial resources caused by the successive prosecution of the same claims of employment discrimination, the Court's disposition of this case is of vital concern to parties in EEO litigation and to the federal and state judiciary.

STATEMENT OF THE CASE

Petitioner filed a discrimination charge with EEOC in May 1976, claiming that he had been laid off and not rehired on the basis of his religion and national

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[2] EEAC has filed briefs as Amicus Curiae with this Court and other courts in cases that raise important issues concerning the interrelationship of various statutory and regulatory EEO schemes. *See, e.g., I.U.E. Local 790 v. Robbins & Meyers,* 429 U.S. 229 (1976); *Great American Savings & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979); *United States v. Trucking Management, Inc.,* 26 FEP Cases 809 (D.C. Cir. 1981); *United States v. East Texas Motor Freight System,* 564 F.2d 179 (5th Cir. 1977).

origin. J.A. 5.[3] In accordance with Title VII procedures, his complaint was referred to the state deferral agency, the New York State Division of Human Rights (NYHRD). After an investigation which included an examination of documents submitted by the employer and three interviews with the petitioner, the NYHRD issued a Determination that there was no probable cause to believe the employer had engaged in the discriminatory practice charged. J.A. 13. Petitioner appealed to the State Appeal Board on substantive and procedural grounds and argued his case both orally and in writing. The Appeal Board affirmed the determination of the NYHRD, and attached to its order a notice setting forth the aggrieved party's right to seek judicial review in the appropriate state appellate court. J.A. 15.

In December 1977, the petitioner sought judicial review in the Appellate Division of the New York Supreme Court. J.A. 23. In February 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be "and the same hereby is confirmed." J.A. 25, *reported in* 402 N.Y.S.2d 699 (1st Dept. 1978). The petitioner did not attempt to obtain review in New York's highest court, the Court of Appeals. In May 1978, the EEOC made a determination that there was not reasonable cause to believe that the charge of discrimination was true and thereupon issued a notice of right to sue in federal district court. J.A. 27.

Petitioner subsequently brought a Title VII action in the District Court for the Southern District of New York. The employer moved for dismissal or for

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[3] References to the Joint Appendix of the parties are cited as "J.A." followed by the appropriate page number.

summary judgment on the ground that the determination of the state Appellate Division constituted a bar under the reasoning of *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977). There, a Second Circuit panel held that a state dismissal of a race discrimination claim operated as res judicata and barred a later action under 42 U.S.C. § 1981. Although the employer's motion to dismiss petitioner's federal suit initially was denied, J.A. 43, *reported in* 464 F. Supp. 468, a renewed motion to dismiss or for summary judgment subsequently was granted after the Second Circuit decided *Sinicropi v. Nassau County*, 601 F.2d 60, *cert. denied*, 444 U.S. 983 (1979), which applied the reasoning of *Mitchell* to a claim under Title VII and held that a state dismissal of a sex discrimination claim barred a later Title VII suit on the same facts. J.A. 55.

Appealing from the judgment of dismissal, petitioner sought reversal in the Second Circuit on the ground, among others, that *Sinicropi* was wrongly decided. Judge Friendly, expressing the views of a Second Circuit panel, ruled that the court would not overturn the decision of another panel rendered after a full consideration of the very point at issue. J.A. 69. Petitioner's subsequent motion for a rehearing *en banc* was denied. J.A. 80.

SUMMARY OF ARGUMENT

The federal courts traditionally have adhered to prior adjudication doctrines under which a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, 101 S. Ct. 411 (1980); *Cromwell v. County of Sac.*, 94 U.S. 351 (1877). The petitioner seeks to avoid

their presumptive application in this case on the grounds that Title VII guarantees him a federal court trial *de novo*, and that state proceedings in which his employment discrimination claim was adjudicated were inadequate. Neither of these contentions has merit. In view of Title VII's limited deferral mechanism to state agency proceedings, its legislative history unequivocally endorsing the application of res judicata, and the policy reasons favoring limitations on multiple suits, petitioner's presentation of his case in state agency proceedings, together with his voluntary pursuit of judicial review in the New York courts, should bar his subsequent Title VII suit in federal court on the same claim.

Title VII spells out in detail the complementary relationship of federal and state EEO enforcement mechanisms. Contrary to the petitioner's contentions, the statute plainly allows only that *initial resort to state administrative remedies* will not deprive the plaintiff of a right to a federal trial de novo on a Title VII claim. See *Chandler v. Roudebush*, 425 U.S. 840, 844-46 (1976). Although Congress anticipated redress of injuries sustained through employment discrimination in several possible forums, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974), and although Title VII permits actions by both EEOC and private grievants, *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), nothing in tne statute so much as suggests that traditional notions of judicial preclusion were not meant to apply.

To the contrary, Title VII's legislative history explicitly acknowledges application of res judicata in

this kind of case. "Once there is a litigation," declared Senator Javits during debate on the Equal Employment Opportunity Act of 1972, "the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted." 3 Legislative History of the Equal Employment Opportunity Act of 1972 1400-01. *Cf.* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2148. This Court should accord substantial weight to such unequivocal indication of congressional intent and approve the use of res judicata in this case.

This Court already has ruled that res judicata and collateral estoppel apply under Section 1983 of the federal Civil Rights Act. *Allen v. McCurry*, 101 S. Ct. 411 (1980); *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973). The reasons for applying these doctrines under Title VII are particularly compelling. The nation's employment discrimination laws have created an array of overlapping and competing remedies. Successive litigation of the same claims is inefficient, expensive and unnecessary to attain the goals of Title VII. Where, in a case like this, a plaintiff has chosen to appeal a state agency dismissal of his EEO claim through the state's appellate courts, "[t]he predicament in which [he] finds himself is of his own making" and this Court should not "upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *Reed v. Allen*, 286 U.S. 191, 198-99 (1932), *cited in Federated Department Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424, 2429 (1981).

ARGUMENT

THE PLAIN LANGUAGE OF TITLE VII, ITS LEGISLATIVE HISTORY, THE DECISIONS OF THIS COURT AND SIGNIFICANT POLICY CONSIDERATIONS ALL FAVOR THE APPLICATION OF JUDICIAL PRECLUSION IN THIS CASE

A. Title VII Contains No Implied or Expressed Restrictions on the Traditional Doctrines of Preclusion

Critical to this Court's recent decision concluding that collateral estoppel applied to actions brought under 42 U.S.C. § 1983 (the Civil Rights Act of 1871), *Allen v. McCurry*, 101 S. Ct. 411 (1980), was the observation that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738, ... *Id.* at 416.[4]

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[4] As this Court noted in *McCurry*, res judicata ("claim preclusion") and collateral estoppel ("issue preclusion") are judicial doctrines designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. 101 S. Ct. at 415. Because they also promote comity between state and federal courts, Congress incorporated their federal-state aspects into positive law shortly after ratification of the Constitution. *Id.* at 416 n.8. Accordingly, 28 U.S.C. § 1738 (1976) mandates that all federal courts give preclusive affect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. The statute provides, in relevant part, that:

> "The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts

The same may be said of Title VII, with the additional observation that because its statutory scheme explicitly makes detailed provision for state proceedings, the absence of limitations on the preclusion doctrines is more striking.

Title VII devotes substantial attention to the interrelationship of state and federal mechanisms for resolving employment discrimination disputes. Thus, under Section 706(e) an employment discrimination charge must be submitted either to the EEOC or an appropriate state agency ("706 agency") within 180 days of the occurrence of the alleged unlawful act. An additional 120 days within which to file with the EEOC is granted aggrieved individuals who make a timely filing with a state or local agency authorized to provide relief from such discrimination. The extended time period for grievants in jurisdictions with appropriate state and local agencies derives from the congressional intent that local authorities first have an opportunity to resolve the dispute. Indeed, Congress included an entire subsection, 706(c), that prohibits a charge from being filed with the EEOC before the expiration of sixty days after proceedings have been commenced before a 706 agency, unless such proceedings have been earlier terminated.

Contrary to petitioner's contentions, nothing in Title VII evidences a congressional intent to allow redundant litigation in order "to encourage full use of state antidiscrimination remedies." (Pet. Br. 25). Although Title VII envisions and promotes federal-

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of such state. . . ." 101 S. Ct. at 416, *also citing Huron Holding Corp. v. Lincoln Mine Operations*, 312 U.S. 183 (1941); *Davis v. Davis*, 305 U.S. 32 (1938).

state cooperation in EEO enforcement,[5] the deferral mechanism is fashioned specifically to give the state agency an initial opportunity only to process EEO claims. Neither the statute nor the decisions of this Court anticipate that complainants will pursue avenues of parallel relief through the state and federal judiciary. To the contrary, under Title VII state agencies are given merely "*a limited opportunity* to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief. . . ." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (emphasis added). *See also Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) (Title VII deferral agencies given a "prior opportunity to consider discrimination complaints. . . ." (emphasis added)). As this Court again recently declared: "Title VII explicitly leaves the States free, and indeed encourages them, to exercise their *regulatory powers* over discriminatory employment practices." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 59 (1980).

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[5] In addition to the state deferral mechanism, "[o]ther provisions of Title VII also evidence the policy of promoting federal-state cooperation in enforcement." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 n.4, *citing* § 706(b), as redesignated, 42 U.S.C. § 2000e-5(b) (EEOC required to "accord substantial weight" to a state administrative determination), and § 709(b), *as amended*, 42 U.S.C. § 2000e-8(b) (authorizing the EEOC to "cooperate with State and local agencies charged with the administration of State fair employment laws" in funding research and other mutually beneficial projects; and to enter into work-sharing agreements with those agencies to facilitate the processing of complaints). *All* of these provisions are directed toward administrative cooperation, however, and lend no evidence of congressional intent to compromise or circumscribe the validity of state *judicial* proceedings.

Similarly, the petitioner's emphasis upon Title VII's provision affording complainants a federal court trial de novo is overstated. (Pet. Br. 12)* It is *initial resort* to state administrative remedies that does not deprive the plaintiff of a right to a federal trial de novo on a Title VII claim. See *Chandler v. Roudebush*, 425 U.S. 840, 844-46 (1976). Hence, although neither a final arbitration under the non-discrimination clause of a collective-bargaining agreement, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), nor a Civil Service Commission adjudication of an employment discrimination claim, *Chandler v. Roudebush, supra*, will bar a complainant's similar first prayer for relief in court, nothing in Title VII

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* Title VII by its terms vests only "jurisdiction," not "exclusive jurisdiction," in federal district courts. 42 U.S.C. § 2000e-5(f)(3). As a general matter, state courts of general jurisdiction have the power to exercise jurisdiction over cases arising under the Constitution, laws or treaties of the United States unless this power is expressly taken away by Congress. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-27 (1820); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). Accordingly, several courts have concluded that state courts retain concurrent jurisdiction over Title VII claims. See *Peterson v. Eastern Airlines*, 20 FEP Cases 1322, 1323 (W.D. Tex. 1979); *Bennun v. Board of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D. N.J. 1976); *Williams v. Virginia Empl. Comm.*, 11 FEP Cases 232-233 (E.D. Va. 1975); *Vason v. Carrano*, 31 Conn. Supp. 338 330 A.2d 98 (1974); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465, 474-75 (1978). The question whether Title VII implicitly grants concurrent jurisdiction over Title VII claims to state courts, we submit, is not raised by this case and is unnecessary to its resolution. Were the Court to acknowledge the existence of concurrent jurisdiction under Title VII, of course, the reasons favoring the application of preclusion doctrines would stand out in even bolder relief.

warrants an exception to the rules of *judicial* preclusion.

B. The Legislative History of Title VII Explicitly Endorses The Application of Res Judicata

In *Allen v. McCurry*, 101 S. Ct. at 417, this Court looked to the legislative history of Section 1983 to determine whether Congress intended to repeal or restrict the traditional doctrines of preclusion. Section 1983 is *specifically designed* to afford civil rights complainants an opportunity for relief in federal court from alleged violation of federal rights under color of State law.[7] Moreover, this Court observed that "one strong motive" behind the statute's enactment was "grave congressional concern that the state courts had been deficient in protecting federal rights," 101 S. Ct. at 417, *citing Mitchum v. Foster*, 407 U.S. 225, 241-242 (1972) and *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Nevertheless, this Court concluded that "where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them," collateral estoppel applied. In the view of this Court, the congressional concern for state court deficiency lent "only the most equivocal support to any argument that, . . . Congress intended to override § 1738 or the common law rules

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[7] For an application of res judicata in the context of Title VII and Section 1983, see *Harrington v. Vandalia-Butler Bd. of Education*, 25 FEP Cases 1257 (6th Cir. 1981). There the court of appeals held that a claimant, who in a previous suit demonstrated sex discrimination on the part of a school board under Title VII, was barred by the prior adjudication from asserting a claim under Section 1983 for damages unavailable under Title VII, based on the same set of operative facts.

of collateral estoppel and res judicata." 101 S. Ct. at 411. "Since repeals by implication are disfavored," this Court cautioned, "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id., citing Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

Title VII's legislative history is less equivocal than that of Section 1983. During Senate debate on legislation that ultimately culminated in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e (1970), Senator Hruska of Nebraska introduced an amendment, the purpose of which was "to avoid the potential situation whereby a respondent is faced with the requirement to defend multiple actions arising from a single offense." 3 Legislative History of the Equal Employment Act of 1972 1400 (Hruska Memorandum, as read by Sen. Javits of New York) (hereinafter *Legislative History*). "Such multiplicity of suits," Senator Hruska warned, "could result in undue burdens in the gathering of evidence and trial expenses as well as harassment and even a form of blackmail." *Id.*

Senator Javits, ranking member of the Senate Committee on Labor and Public Welfare and the Senate Subcommittee on Labor,[8] opposed the amend-

[8] Senator Javits, a practicing lawyer since 1927, was a co-sponsor of legislation in the Senate that culminated in enactment of the 1972 amendments. He participated in Congressional debate on almost every topic concerning the Act. See 2 *Legislative History* VII-XVII. He was subsequently appointed a conferee on the part of the Senate. See *Legislative History* at 1797, 1799.

ment specifically on the ground that res judicata was available to prevent duplicate employment discrimination lawsuits:

> "[T]here is the real capability in this situation of dealing with the question on the basis of res judicata. In other words, once there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—*the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted.*"

Legislative History at 1400-01 (Remarks of Sen. Javits) (emphasis added).

Congressional concern over duplicate suits again was expressed during consideration of a provision in the 1972 amendments that would have conferred cease and desist power on EEOC. Although the cease and desist provision was eventually amended out of the bill, Congress' concern over duplication was made clear in the House Report relating to the 1972 Amendments:

> "The committee was concerned about the interrelationship between the newly created cease and desist . . . powers of the Commission and the existing right of private action. *It concluded that duplication of proceeding should be avoided.* The bill, therefore, contains a provision for termination of . . . the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and to the person aggrieved."

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2148 (em-

phasis added). See *EEOC v. Missouri Pacific R.R.*, 493 F.2d 71, 74 (8th Cir. 1974).

Accordingly, the intention of Congress to apply res judicata to Title VII and to discourage the duplication of proceedings was manifested in both debate and committee report. This Court has on numerous occasions declared that "the intention of the lawmaker is the law."[9] When a legislature "has intimated its will," Justice Holmes declared, "that will should be recognized and obeyed. . . ." *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908), *quoted in Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 391 n.4 (1939).

C. Notwithstanding Title VII's Multiple Enforcement Scheme, This Court Has Preserved the Integrity of Traditional Preclusion Rules For Application in This Kind of Case

The merits of the doctrine of res judicata and the beneficial consequences flowing from its uniform application have been noted by this Court on many occasions. In one recent case, this Court affirmed that the doctrine "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Federated Department Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424, 2429 (1981). "There is simply 'no principle of law or equity,'" this Court reiterated, " 'which sanctions the rejection by a federal court of the salutary principle of *res judicata.*' " *Id., citing Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

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[9] *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); *United States v. Babbitt*, 66 U.S. 55, 61 (1861).

Notwithstanding this flat presumption favoring judicial preclusion, however, the petitioner seeks to carve out an exception for Title VII cases on the basis of several of this Court's decisions which address the statute's multiple enforcement scheme. Not only is this approach wholly lacking in support, but a careful reading of those cases reflects this Court's concern that the traditional principles of judicial preclusion *not* be disturbed in the Title VII area.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for example, this Court concluded that an individual does not forfeit his private cause of action under Title VII if he initially pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The Court perceived fundamental differences between the arbitral and judicial forums and concluded that the policies of each forum were promoted by independent consideration of the claim. 415 U.S. at 50-51.[19] In emphasizing that the arbitrator, unlike the courts, was without authority to invoke public law concepts, including those of Title VII, *id.* at 51, the Court narrowed its holding in a way that fully pro-

[19] The Court observed that by submitting a grievance to arbitration, an employee is pursuing a contract right that flows from the collective bargaining agreement. The rights asserted in a Title VII action, on the other hand, flowed from an act of Congress independent of the labor-management bargaining process and are not subject to labor arbitration. 415 U.S. at 52. A state employment discrimination claim, of course, flows from an act of a legislature and where, as in this case, a fair hearing is held, the state procedure affords a complainant the opportunity to vindicate a public right similar to Title VII. This is evidenced by express deferral provisions in Title VII requiring initial resort to state EEO enforcement mechanisms.

tected the continued applicability of judicial preclusion.

Of similar import is *Chandler v. Roudebush*, 425 U.S. 840 (1976). There the plaintiff, a federal employee, litigated an employment discrimination claim before the Civil Service Commission and, after an adverse ruling, sought de novo review by the federal district court. This Court upheld the plaintiff's right to such a review, because the legislative history of Title VII evinced "an unambiguous choice to grant federal employees the right to plenary trials in the federal district courts." *Id.* at 853-854. The Court, however, plainly avoided any compromise of preclusion principles. Rather, it based its decision upon the explicit Congressional concern that primary adjudicative authority in the area of discrimination in federal employment repose in Federal district courts, and *not* in federal agencies. *Id.* at 853. Accordingly, construing *Chandler* in its broadest light, the decision merely suggests support for the proposition that a state *administrative* ruling will not bind federal courts in later Title VII actions.

On the other hand, the implication that res judicata remains appropriate under Title VII [11] and should

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[11] "Principles of res judicata," it has been observed, "are fully applicable to actions brought under the federal Civil Rights Act." *Bennun v. Bd. of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D. N.J. 1976), *citing Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (§ 1983). *See also Allen v. McCurry*, 101 S. Ct. 411 (1980) (collateral estoppel applicable under § 1983). Encouraged, in part, by this Court's reaffirmation in *Stone v. Powell*, 428 U.S. 465, 485 n.35 (1976), that state courts provide forums as fair and as competent as federal courts for adjudication of Fourth Amendment claims, the

apply in the case of proceedings brought under New York's anti-discrimination laws is strengthened by this Court's opinion in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). This Court there addressed whether a prevailing plaintiff in an action brought under Title VII in federal court would collect attorney's fees incurred in prior state proceedings on the discriminatory employment complaint. The Court ruled that because Section 706(k) authorizes a fee award to the prevailing party in "any . . . proceeding under this title," the statute implicitly allows for federal judicial proceedings in the area of attorney's fees to *supplement* state deferral proceedings. In so ruling, this Court indicated that because Title VII anticipates a successive state agency-federal court enforcement scheme, partial relief obtained locally could be made complete in subsequent proceedings. The Court's ruling, however, did not in any way indicate that New York state judicial proceedings were not preclusive to the extent relief was granted. Indeed, the Court specifically noted attributes of the State's procedural scheme that plainly call for the application of preclusion principles. Thus, the "New York state procedure," this Court observed, "provides for adversarial quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review." 447 U.S. at 68. The procedures there outlined are the same as those involved in this case. Here, however, petitioner voluntarily triggered state judicial review of

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Second Circuit previously has ruled that adjudication under New York's fair employment law bars later adjudication under Section 1981. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977).

the state administrative proceedings. This Court in *Carey* did not approve redundant litigation, but spoke only in terms of "complementary" remedies, 447 U.S. at 65.

Even with respect to Title VII enforcement itself, which contains provisions for multiple remedies, this Court has cautioned against duplicate litigation. In *General Telephone Co. of the Northwest, Inc., v. EEOC*, 446 U.S. 318 (1980), this Court ruled that the EEOC may maintain its § 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Although the holding did not make the judgment in an EEOC suit binding upon all individuals with similar grievances in the class or subclasses that might be certified, this Court specifically cautioned against the possibility of double suits:

> "The courts, however, are not powerless to prevent undue hardship to the defendant and should perform accordingly. . . . Where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action. The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly."

446 U.S. at 333. *See also Jefferson v. Connors Steel Co.*, 25 EDP ¶ 31,602 at 19,485 (N.D. Ala. 1981) (*General Telephone* does not alter bar as to duplicate lawsuits).

Petitioner seeks to evade the application of these principles by arguing that his state proceedings were perfunctory and that, in any event, res judicata

application could have unfair consequences if complainants lost the right to trial de novo in federal court under Title VII because defendants triggered state judicial review of administrative proceedings. Neither contention has merit.

With respect to the nature of the state proceedings, it should be noted that they were the same as this Court described in its opinion in *New York Gaslight Club, Inc. v. Carey, supra.* There is no evidence that the state proceedings failed to accord petitioner the traditional indices of due process. As the Second Circuit correctly noted previously, the "right to a day in court" does not mean "the actual presentation of the case in the context of a formal, evidentiary hearing," but rather "the right to be duly cited to appear and to be afforded an opportunity to be heard," *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 271 (2d Cir. 1977), *citing Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163, 165 (6th Cir. 1941), *quoted in* 1B *Moore's Federal Practice* ¶ 0.409-1, at 1008 (1974). The court below here observed that petitioner was accorded an investigation which included three interviews and an examination of documents, and that he argued his case both orally and in writing to a state appeals board. J.A. 69-70. In accordance with New York procedures, the Appellate Division of the State Supreme Court reviewed the record. J.A. 25-26. On these facts, it cannot be said that petitioner was denied a fair opportunity to present his employment discrimination claims.[12]

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[12] In examining the plaintiff's complaints about the fairness of the proceeding below it should be recalled that the plaintiff was not compelled to pursue his claim through the

Petitioner's argument that *defendant-triggered* state judicial review will frustrate Title VII's provision affording federal trial *de novo* can quickly be disposed of by observing, quite simply, that the issue is not before this Court. For the record, however, it should be noted that the federal courts are capable of exercising discretion to avoid any potential for unfairness in the application of prior adjudication doctrines. Thus, for example, where Title VII plaintiffs have instituted employment discrimination suits in federal and state courts in tandem, federal courts have granted stays of the federal litigation pending the outcome of state court proceedings. See *Carr v. Grace*, 516 F.2d 502 (5th Cir. 1975); *Kent v. New York City, Dept. of Sanitation*, 24 EDP ¶ 31,343 (S.D.N.Y. 1980).

In this case, the operative legal principles are clear. Exhaustion of state proceedings is *not* required by the deferral provision of Title VII. The petitioner

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state appellate process. Thus, his complaints of unfairness are even less compelling than those of the plaintiff in *Allen v. McCurry* where this Court noted that the plaintiff did not want to be in the state forum. As the Court stated:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding *in which he would rather not have been engaged at all.*

101 S. Ct. at 420 (emphasis added). Moreover, despite the fact that the plaintiff is dissatisfied with the state judgment and believes it is incorrect, this Court has indicated that even an *erroneous* judgment of another court does not weigh in favor of circumventing the preclusive effect of a prior court ruling. See *Federated Dept. Stores, Inc., et al. v. Moitie*, 101 S. Ct. at 2427-28.

never was forced into the "Catch-22 choice" of complying with exhaustion requirements and losing his federal claim or bringing a federal claim and suffering a dismissal for failure to exhaust. See *James v. Board of Education*, 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). Here, res judicata attached when the petitioner chose to pursue his claim in the state courts, and not before. See *Mitchell v. National Broadcasting Co.*, 553 F.2d at 276; *Sinicropi v. Nassau County*, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979).

D. Significant Policy Considerations Arising From The Multiplicity of Forums and Remedies Available In EEO Disputes Favor The Application of Judicial Preclusion

As a result of multiple federal statutes and rules, and an expanding array of state laws, a defendant accused of employment discrimination is subject to overlapping remedial schemes [13] and enforcement au-

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[13] Although employment discrimination remedies are independent, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), the presumption against redundant litigation remains. As one commentator has observed and opined:

> "Although providing multiple remedies, neither Congress nor the Court, however, has approved multiple suits as a means to effectuate those remedies. When multiple discrimination claims arise from a single event, the grievant can prosecute the multiple claims in a single suit. To permit multiple suits based on independent remedies would only harass defendants without appreciably serving the desire to end discrimination."

Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. Ill. L.F. 1049, 1095.

thorities. Consequently, the potential for vexatious litigation, inconsistent judgments, and judicial inefficiency is enormous. The consistent and even-handed application of judicial preclusion doctrines represents the most equitable and effective means by which to curb complainants from engaging in redundant litigation.

In view of Congress' intent "to allow an individual to pursue independently his rights under both Title VII and other . . . federal statutes," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), it is particularly compelling that doctrines limiting multiple actions be available "to mitigate the harshness to those accused of employment discrimination resulting from what one source has described as 'multiple jeopardy' . . . ." (citation omitted) *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 (5th Cir. 1974).

In the area of employment discrimination, no less so than in the area of antitrust, arguments against prior adjudication on the grounds of "simple justice" are misplaced. See *Federated Dept. Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424 (1981). In view of the multiple remedies available in employment discrimination, this Court's observation in *Moitie* is particularly compelling:

> "The predicament in which [petitioner] finds himself is of his own making . . . we cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the

> mischief which would follow the establishment of precedent for so disregarding the salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

Moitie, 101 S. Ct. at 2429, *citing Reed v. Allen*, 286 U.S. 191, 198-99 (1932).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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